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### Financial Misrepresentations as Grounds for Annulment of Marriage Contract

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under or through the mortgagor, until the lien is foreclosed. Foreclosure of the lien does not take place upon the commencement of a foreclosure action, but upon a sale under a judgment of foreclosure. Though, during the pendency of the action, a court of equity has power to issue interlocutory orders for the protection of an asserted lien, such orders must be auxiliary to the right to foreclose the lien, and cannot deprive any party of a title or a right, which though subordinate to the lien of the mortgage, survive and are valid until the lien is foreclosed by a sale under a judgment of foreclosure."

It would seem, in view of this decision, that tenants in possession of premises under foreclosure are similarly situated until a sale therein, whether the lease be prior or subsequent to the mortgage; or, if the latter, whether or not they have been made parties to the action. The rule has been uniform where the lease is prior to the mortgage, viz.: the lessee is protected where advance payments have been made in good faith, and is liable for rent accruing after the appointment of a receiver or then remaining unpaid.<sup>25</sup>

In light of the *Child's* case, the decision is unquestionably sound in theory and affords a more tenable position to the lessee. It is true that circumstances will arise wherein the mortgagee, through unavoidable delay in bringing the action to judgment and sale, will be deprived of a substantial measure of security. Such a situation does not justify the broad power of interference heretofore exercised.

How far the rule will be extended is not here conjectured. It should not, however, be seized upon to limit the remedies of the mortgagee, by application to cases beyond its purport.<sup>26</sup>

JOSEPH F. KELLY.

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#### FINANCIAL MISREPRESENTATIONS AS GROUNDS FOR ANNULMENT OF MARRIAGE CONTRACT.

The plaintiff, who had been keeping company with the defendant for some time, in reply to her constant importunings for mar-

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<sup>25</sup> *Isaacs v. Greenberg*, 145 N. Y. Supp. 921 (1914).

<sup>26</sup> That the law in regard to the payment of rent during foreclosure proceedings has not been entirely settled by the decision in the *Prudence* case is evident from a reading of the decision in the case of *Holmes v. Gravenhorst*, decided by Steinbrink, J., at Special Term, Kings County, under date of March 11, 1933, reported in Vol. 89 N. Y. L. J. at 1448. In that case the learned judge held that the decision in the *Prudence* case swept away completely the right of a court of equity to fix the occupational rent of premises pending the foreclosure proceedings tenanted by the owner of the fee.

The writer feels that the Court of Appeals in its decision in the *Prudence* case in no way intimated that it intended to do away with the power of a court of equity to fix the fair and reasonable value of premises occupied by the owner of the fee pending a foreclosure. It seems from a study of the Court of Appeals decision that no basis for such an inference can be there found.

riage, stated that while he was not unwilling, he was unable to marry her due to his lack of means to support a wife. The defendant offered to help him with money when the opportunity came. With the arrival of a business opportunity, the defendant promised to give the plaintiff the needed money, some \$6,000, after the wedding. The marriage over, the plaintiff discovered that the defendant did not have, and never possessed, the promised money. Plaintiff accordingly brought an action to have the marriage annulled. The Referee and the Appellate Division,<sup>1</sup> by a three to two decision, refused a decree on the ground that the misrepresentation was not as to a "material" fact. The Court of Appeals,<sup>2</sup> in a four to three decision, reversed the decree, finding the misrepresentation sufficiently material to warrant the annulment of the marriage.

"Marriage, so far as its validity is concerned, continues to be a civil contract, to which the consent of the parties capable in law of making a contract is essential."<sup>3</sup> So it was, too, before the statute was enacted.<sup>4</sup> The essentials of marriage, as a civil contract, are therefore, (a) consent by (b) parties having statutory capacity to give it. Any lack in those essentials makes the marriage void<sup>5</sup> or voidable.<sup>6</sup> If either party consents by reason of fraud, there is, in reality, no consent. Hence, the marriage is voidable,<sup>7</sup> and an action may be maintained to annul it. While the jurisdiction of the court to annul is purely statutory,<sup>8</sup> it is, nevertheless, equitable in its nature;<sup>9</sup> particularly, where fraud is charged.<sup>10</sup> The statute is silent as to what constitutes fraud. The legislature, by its silence, has adopted the discerning attitude of equity, which refuses to delimit fraud, lest by so doing, it provide a refuge of safety for the cunning, but reprehensible, just outside the definition.<sup>11</sup> Thus, the court is free to meet each case as it arises, and to apply to the defendant's conduct the hoary, but righteous, test of fair and conscientious dealing.<sup>12</sup> But fraud alone is of no avail unless followed by the statutory consequence that consent to the marriage

<sup>1</sup> *Shonfeld v. Shonfeld*, 236 App. Div. 271, 258 N. Y. Supp. 338 (1st Dept. 1932).

<sup>2</sup> 260 N. Y. 477, 184 N. E. 60 (1933).

<sup>3</sup> DOMESTIC RELATIONS LAW; N. Y. CONS. LAWS, c. 14, §10.

<sup>4</sup> *Ferlat v. Gojon*, 1 Hopkins Ch. 478 (N. Y. 1825).

<sup>5</sup> *Supra* note 3, §§5 and 6.

<sup>6</sup> *Ibid.* §7.

<sup>7</sup> *Ibid.* subd. 4.

<sup>8</sup> *Walter v. Walter*, 217 N. Y. 439, 111 N. E. 1081 (1916).

<sup>9</sup> *Cf. Bays v. Bays*, 105 Misc. 492, 174 N. Y. Supp. 212 (1918).

<sup>10</sup> *Supra* note 2; *Fiske v. Fiske*, 6 App. Div. 432, 39 N. Y. Supp. 537 (1st Dept. 1896). In the *Fiske* case the Court wrote: "The jurisdiction of the court to annul a marriage on the ground of fraud is not acquired by the provision of any statute. It arises from the inherent jurisdiction of a court of chancery to set aside any contract when one of the parties was induced to enter into it by fraud upon him."

<sup>11</sup> *Supra* note 2, at 479, N. E. at 61.

<sup>12</sup> *Ibid.*

was given by reason of it.<sup>13</sup> What must be the nature of the fraud to bring about the statutory result? It is, precisely, at this point that the controversy arises.<sup>14</sup> Fundamentally, the dispute involves a conflict of social philosophies. One line of decisions regards marriage as something pre-eminently sacred, of the divine, sacrosanct—a relationship that is not to be tampered with by mundane hands; except in cases of extreme necessity. Another line of cases views marriage as an earthly affair, a civil contract between two fallible mortals, which contract may be voided by the party whose consent was fraudulently procured, exactly as in an ordinary contract.

The outstanding authority proclaiming the first view is *Fiske v. Fiske*,<sup>15</sup> the inspirational source of all the later cases adopting the same position. Here it was held that no ordinary fraud would warrant the annulment of a marriage. The fraud must be as to a matter which would prevent the parties from entering into the marriage relationship, or, having entered into such relationship, would preclude them from performing the duties incident thereto. Fraud that was immaterial could be disregarded, and no fraud was to be deemed material unless it went "to the very essence of the contract," that is, affected the marital relationship. These views have found ample support in New York.<sup>16</sup> The law in England is substantially the same.<sup>17</sup>

The second view mentioned has its leading protagonist in the case of *Di Lorenzo v. Di Lorenzo*.<sup>18</sup> Here it was stated that under

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<sup>13</sup> *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 67 N. E. 63 (1903); *Svenson v. Svenson*, 178 N. Y. 54, 70 N. E. 120 (1904).

<sup>14</sup> *Supra* note 2, at 484, N. E. at 63.

<sup>15</sup> *Supra* note 10. Here, the fraud claimed was the concealment of a prior marriage and divorce by the defendant wife. At page 434 the Court wrote: " \* \* \* the fraud which will induce the court to set aside an ordinary contract is something different from the fraud which will induce the court to set aside a contract of marriage which has been executed, or even a contract which is still executory \* \* \* no fraud will avoid a marriage contract which does not go to the very essence of the contract, and which is not in its nature such a thing as would either prevent the party from entering into the marriage relation, or having entered into it, would preclude the performance of the duties which the law and custom imposes upon the husband or wife as a party to the contract. \* \* \* Within the rule it has been held that the fraudulent representations of one party as to faith, social position, fortune, good health and temperament do not vitiate the contract." And again, on page 435: "If when the relation is entered into, the party is competent to make that contract, is mentally competent to do the duties which the contract invokes, and physically able to meet its obligations, nothing more is required; \* \* \*."

<sup>16</sup> *Barker v. Barker*, 88 Misc. 300, 151 N. Y. Supp. 811 (1914); *Roth v. Roth*, 97 Misc. 136, 161 N. Y. Supp. 99 (1916); *Beckermeister v. Beckermeister*, 170 N. Y. Supp. 22 (1918); *Price v. Tompkins*, 171 N. Y. Supp. 844 (1918); *Price v. Tompkins*, 108 Misc. 263, 177 N. Y. Supp. 548 (1919); *Butler v. Butler*, 204 App. Div. 602, 198 N. Y. Supp. 391 (1st Dept. 1923).

<sup>17</sup> *Fessenden, Nullity of Marriage* (1899) 13 HARV. L. REV. 110; *Notes* (1920) 34 HARV. L. REV. 218.

<sup>18</sup> *Supra* note 13. In this case, the plaintiff, who had been living in a meretricious relationship with the defendant, left the state for some time; on his return he married the defendant, being induced so to do by her fraudulent

the statute,<sup>19</sup> a contract to marry is a civil contract, subject to the rules of free consent in such contracts, and voidable in the event of fraud. But it was held that not every fraud, by reason of which the particular person may have given consent to the marriage, is an adequate basis for annulment. Any fraud is adequate which is "material to that degree that had it not been practiced, the party deceived would not have consented to the marriage,"<sup>20</sup> and is "of such a nature as to deceive an ordinarily prudent person."<sup>21</sup> Nothing was herein said about the necessity of the fraud going "to the very essence of the contract" in order to be material. The crucial inquiries are: Would the plaintiff's consent to marry have been absent were it not for the misrepresentation? Did the plaintiff act reasonably? If these questions are answered in the affirmative, an annulment must be granted regardless of the subject matter of the fraud. The fraud under these circumstances destroys the vital and life-giving element of a civil contract: the element of free consent. The mandate of the law in such a case is clear.<sup>22</sup> This view was forcibly reiterated in *Domsche v. Domsche*.<sup>23</sup>

misrepresentation that he was the father of her child, but which child she had in fact borrowed to enable her to beguile the plaintiff into marriage. The marriage was annulled.

<sup>19</sup> *Supra* note 3.

<sup>20</sup> *Supra* note 13, at 471, N. E. at 64.

<sup>21</sup> *Ibid.* at 474, N. E. at 65. At page 472, N. E. at 64 the Court wrote: "While it is true, that marriage contracts are fixed upon considerations peculiar to themselves and that public policy is concerned with the regulation of the family relation, nevertheless, our law considers marriage in no other light than as a civil contract.

"The free and full consent which is the essence of all ordinary contracts, is expressly made by the statute necessary to the validity of the marriage contract. The minds of the parties must meet in one intention. It is a general rule that every misrepresentation of a material fact, made with the intention to induce the other party to enter into the contract and without which he would not have done so, justifies the court in vacating the agreement. It is obvious that no one would obligate himself by a contract, if he knew that a material misrepresentation entering into the reason for his consent, was untrue. There is no valid reason for exempting the marriage contract from the general rule."

<sup>22</sup> *Supra* notes 3 and 7.

<sup>23</sup> 138 App. Div. 454, 122 N. Y. Supp. 892 (2d Dept. 1910). This was an action to annul a marriage for fraud in that, prior to the marriage, plaintiff's wife represented to him that she had been the wife of a man then deceased, to whom her child was born, when in truth she had been that man's mistress, and the child was a bastard. The marriage was annulled. At page 456, the Court wrote: "It is quite true that such a representation is not as to the essentialia of the marriage contract, for previous chastity is not a necessary qualification for cohabitation or the full discharge of the duties of consortium. But it seems to me that the question is whether such representation may not be as to a fact material to the consent of the other party to make the contract \* \* \* [here quoting from the *Di Lorenzo* case, *supra* note 13] \* \* \* there we have the principle enunciated that the materiality goes to the consent to the contract and need not strike at the capacity to perform it." Again, on page 458: "I cannot perceive that the question is affected by the circumstance that the marriage was consummated, for the sole relation of the false representation, as used by the law, is to the consent to the contract of marriage, and the sole limitation is voluntary cohabitation subsequent to the full knowledge of the facts."

The prevailing opinion of the Appellate Division<sup>24</sup> and the dissenting opinion of the Court of Appeals<sup>25</sup> in the *Shonfeld* case, are based upon the "to the very essence of the contract" doctrine. Both decisions, basically, are rooted in the philosophy of a section from a work by Bishop,<sup>26</sup> which frequently is cited with approval: "In the contract of marriage, which forms the gateway to the marriage status, the parties take each other for better, for worse, for richer, for poorer, to cherish each other in sickness and in health; consequently a mistake, whether resulting from accident, or in general, from fraudulent practices, in respect to the character, fortune, health, or the like, does not render void what is done." This section is undoubtedly rhetorical; but it is in absolute variance with the solid facts of life. It is unmitigated rigor, not law. If this section were followed literally, no annulment could be granted when one party represents himself as being in good health when as a matter of fact he is infected with syphilis,<sup>27</sup> or is an incurable drug addict,<sup>28</sup> or where one party represents himself as a person of impeccable character when he is an ex-convict with many convictions for felonies,<sup>29</sup> or is an active thief being hunted by the police throughout the land.<sup>30</sup> In every such case, the New York courts have granted an annulment.<sup>31</sup>

Judge Crane, in his dissenting opinion,<sup>32</sup> characterizes this marriage as a mere matter of bargain and sale, and concludes that the court should not annul the marriage merely because one of the parties is disappointed in the material wealth of the other. He says: "The question is whether the marriage ceremony in this state is of any binding force or whether it is a mere empty ceremony."<sup>33</sup> The learned judge strenuously objects to commercialism in marriage. Perhaps it would be better if people married for love alone; but the fact is they do not. Wealth and social position are very often the predominant reasons for marriage. These are facts of life, and the court should not bandage its eyes when dealing with intensely human problems. Liberating parties when one spouse feels that he cannot live with the other, will not weaken the institution of marriage. But, on the other hand, there is a great probability that marriage will become "a mere empty ceremony" when the court refuses to annul a marriage where there is no possibility that the

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<sup>24</sup> *Supra* note 1.

<sup>25</sup> *Supra* note 2.

<sup>26</sup> 1 BISHOP, MARRIAGE AND DIVORCE (6th ed.) 167.

<sup>27</sup> Anonymous, 21 Misc. 765, 49 N. Y. Supp. 331 (1897); *Svenson v. Svenson*, *supra* note 13.

<sup>28</sup> *O'Connell v. O'Connell*, 201 App. Div. 338, 194 N. Y. Supp. 265 (1st Dept. 1922).

<sup>29</sup> *Harris v. Harris*, 201 App. Div. 880, 193 N. Y. Supp. 936 (1st Dept. 1922).

<sup>30</sup> *Keyes v. Keyes*, 6 Misc. 355, 26 N. Y. Supp. 910 (1893).

<sup>31</sup> *Supra* notes 27, 28, 29 and 30.

<sup>32</sup> *Supra* note 2.

<sup>33</sup> *Ibid.* at 482, N. E. at 62.

spouses will live together; and this because of an ante-nuptial fraud through which consent to the marriage was procured.

The prevailing opinion in the *Shonfeld* case,<sup>34</sup> once and for all time, repudiates the "to the very essence of the contract" doctrine<sup>35</sup> as enunciated in the *Fiske* case. The Court approves the criterion established in the *Di Lorenzo* case<sup>36</sup> for the determining of the materiality of the fraud, and unequivocally accepts the doctrine in that case to the effect that marriage is a civil contract and voidable in the absence of free consent.<sup>37</sup>

When Judge Crouch, speaking for the majority, says: "\* \* \* no public policy demands that prudent consideration of ability to fulfill the duty of support shall not have a legitimate place in the determination by a party whether or not to marry,"<sup>38</sup> we hear the authentic voice of judicial realism.

JACOB SALZMAN.

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#### NEGOTIABILITY OF CORPORATE BONDS.

There is a sharp diversity of opinion concerning the negotiability of corporate bonds or notes issued under a collateral trust deed or agreement, which bonds or notes contain on their face a reference clause referring the holder to said trust deed or agreement for a statement concerning the security posted, or the rights and liabilities of the holder of said bonds or notes, or both.

The arguments pro and con center upon two theories: (1) notice, (2) consistency. The federal rule is, that such a clause gives a purchaser notice, actual or implied, of all the terms of the trust deed or agreement, and a provision in such deed limiting or regulating the method of enforcing the liability of the obligor on said bond or note is not inconsistent with the promise to pay therein expressed. The New York rule is that the question of notice is one dependent upon the wording of said clause and if a clause in a trust deed affects in any way the promise to pay expressed in the bond, such is inconsistent with said promise and must be disregarded.

In the *New York Law Journal*, Feb. 8, 1933, Goldstein, J., directed a verdict in favor of the plaintiff in an action based on a bond of the defendant issued under and pursuant to a trust agree-

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<sup>34</sup> *Supra* note 2.

<sup>35</sup> *Ibid.* at 479, N. E. at 61: "\* \* \* the fraud need not necessarily concern what is commonly called the essentials of the marriage relation: the rights and duties connected with cohabitation and consortium attached by law to the marital status."

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* at 482, N. E. at 62.